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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

Jeff Font-Ruiz,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the absence of a conviction for a violation of a substantive offense involving bribery, under 18 U.S.C. §666, does the state have the power to indict for a conspiracy, under 18 U.S.C. §371, to violate such substantive offense? Is this Court's *Iannelli* decision dictum and incorrect in light of Wharton's Rule?

PARTIES

All parties to this case are listed in the caption.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit was not published. The Judgment, Appeal No. 09-2638, is reproduced at Pet. App. 1 –3.

JURISDICTION

The United States Court of Appeals for the First Circuit filed its Judgment on October 8, 2010. Mr. Font-Ruiz sought and was granted an extension of time to file this petition until March 7, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The text of 18 U.S.C. §666 and 18 U.S.C. §371 are set out in the statutory appendix.

STATEMENT OF THE CASE

Wharton's Rule was first formally announced in *Shannon v. Commonwealth*, 14 Pa. 226 (1850). Francis Wharton, identified the doctrine and its fundamental rationale. 2 F. Wharton, Criminal Law §1604, p. 1862 (12th ed. 1932). The Rule has been recognized by numerous courts, state and federal, including this one. *Gebardi v. United States*, 287 U.S. 112, 121-22 (1932). However, the most salient exposition of the Rule and its interpretation is found in *Iannelli v. United States*, 420 U.S. 770 (1975).

Therein, the Court found that the rule was inapplicable to the factual situation before it. However, in dictum, it held that "We do not consider initial dismissal of the conspiracy charge to be required in such a case. When both charges are considered at a single trial, the real problem is the avoidance of dual punishment." *Iannelli*, *supra* at fn. 18. Such dictum has been adopted by countless courts, including the First Circuit in *United States v. Previte*, 648 F.2d 73, 77 (1st Cir. 1981). In the present case, the First Circuit relied on such dictum, as reiterated in *Previte*, to hold that "the rule does not forbid charging both a conspiracy and a substantive crime – it merely forbids sentencing on both – which did not happen here because defendant was only convicted of the conspiracy count."

The courts are split, directly, semi-directly, and/or indirectly, before and after the dictum, as to whether a conspiracy can be charged when there is no charge or conviction for the substantive offense, like in this case.

The issue has been outstanding for decades. It is an important issue that needs to be resolved in light of the countless cases before the federal district courts where a person not found guilty of a substantive offense covered by Wharton is exposed to a trial for a crime which does not exist.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for four reasons. First, the question presented could not be solved the right way, nor will it can be solved the right way in future cases, because the federal, and state courts, rely on this Court's *Iannelli* dictum as if it were the law of the land. The reason for such reliance is that this Court's opinion in *Iannelli* is confusing and overextends itself beyond the issues before the Court. A merits brief in this case will provide the Court with the opportunity to consider the reasons why such dictum is wrong. *See infra* Point I. Second, the dictum is wrong. Wharton's Rule is an exception to the general rule that a conspiracy can be charged simultaneously with the substantive offense. This is so because, in cases like the one before the Court involving bribery between the giver and taker of the bribe, there is a presumption, absent any expression from the Congress otherwise, that the danger involved in the conspiracy is covered by the danger in the substantive offense. That is, it is presumed that a conspiracy between the giver and the taker of the bribe does not present additional dangers to society than those involved in the substantive offense. Since the Congress has said nothing to the contrary, a conspiracy charge is not valid independently of whether or not there was a conviction for the substantive offense. *See infra* Point II. Third, for more than a century the federal, and state courts, have expressed their understanding as to how the Rule is to be applied, in divergent ways. *Iannelli*, did not solve that problem since in such case it was found that the Rule did not apply. The Court

should settle the differences between the federal courts as to how to apply the Rule in a situation not covered by *Iannelli* such as the one the Petitioner is presenting to the Court. *See infra* Point III. Fourth, this is an issue of national importance. It affects hundreds of cases each year, not only with regards to bribery but also with regards to other situations such as buyer-seller relationships. The federal courts should have a clear guideline to follow. *See infra* Point IV.

I. Federal courts reliance on the *Iannelli* dictum

The issue before the Court in *Iannelli* was whether or not Wharton's Rule applied to the situation there – defendants had been accused of a violation of 18 U.S.C. §1955 and §371. Section 1955 mandates that if five persons or more gather to conduct gambling activities they should be guilty of violation of such section. The Court found, for the reasons stated therein, that Wharton's Rule did not apply. After analyzing the legislative history of §1955 and the application of the Rule to it, it concluded that

> Viewed in the context of this legislation, there simply is no basis for relying on a presumption to reach a result so plainly at odds with congressional intent. We think it evident that Congress intended to retain each offense as an "independent curb" available for use in the strategy against organized crime. *Gore v. United States*, 357 U.S. 386, 389 (1958). We conclude, therefore, that the history and

> structure of the Organized Crime Control Act of 1970 manifest a clear and unmistakable legislative judgment that more than outweighs any presumption of merger between the conspiracy to violate §1955 and the consummation of that substantive offense.

Iannelli, supra at 790-91. Hence, the decision was based on the conclusion that the Rule did not apply because the legislative intent was "manifest and clear" that the necessary participants for the Rule to apply were not present. The case was solved using a "third person" analysis to show that the Rule did not apply.

Further, evidence that the issue that concerns us was not decided in *Iannelli*, and thus its footnote 18 was dictum, is that in the footnote itself it refers to its application as "in such a case." In the main text at p. 785 it explained what it meant by "such a case":

> Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In **such cases**, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity.

(Bold added, italics in the original) Hence, what was expressed on page 785, including footnote 18, was an opinion of a hypothetical situation which was not the one before the Court. The Court did not reach the issue that the Petitioner is presenting to the Court because the Rule did not apply to the Petitioners in *Iannelli*.

In conclusion, such dictum is an opinion by this Court on which many courts are relying and which should be clarified after proper briefing by the parties in this case.

II. The Court's dictum in *Iannelli* is incorrect

In *Iannelli* at 643 the Court stated: "Unlike crimes that arise in a single transaction ... the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Pinkerton v. United States*, *supra*, at 643." *Iannelli* at p. 777. That is the general rule – a conspiracy can be charged alongside the substantive offense. Wharton provides an exception in certain types of crimes – e.g. bribery. See *United States v. Dietrich*, 126 F. 664 (8th Cir. 1904). The Court in *Iannelli* at 782 provided the correct reasoning when it stated that Wharton applies to certain cases where it acts as a presumption of legislative intent. That is, if there is no express legislative intent in cases such as bribery, it should be presumed that the conspiracy element was inherent in it and that the Congress did not intend to have it enforced as a separate offense under §371. This presumption operates and is a valid one because it is understood, in the absence of any expression by the Congress to the contrary, that Wharton offenses do not present dangers additional than those inherent in reaching the substantive offense. In the words of the Court:

> Commentators who have examined the Rule have identified its major underlying premise to

> be that agreements to commit crimes to which it applies do not seem to present the distinct dangers that the law of conspiracy seeks to avert.

Iannelli at fn. 16.

The problem with the dictum in *Iannelli* is that it is asserting that the doctrine of merger exists in Wharton crimes. That is, it relies on the old doctrine of merger which holds that a conspiracy is a separate crime which prepares the defendant to commit the substantive offense and that, once the substantive offense is committed, the conspiracy crime disappears. The dictum, thus, presumes that which should not be presumed under Wharton – that the Congress intended the Wharton conspiracy to exist outside of its substantive source. This is the main source of variance among the opinions on the matter. Some courts say that the Wharton conspiracy exists before the substantive offense is committed, and others think that it does not because it should be presumed that the conspiracy in a Wharton offense is not serious enough to warrant separate consideration.

Illustrative of the reasoning above is this Court's own opinion in *Gebardi v. United States*, 287 U.S. 112, 119-22, 53 S. Ct. 35, 77 L. Ed. 206 (1932). In *Gebardi* the Court held that a conspiracy to commit a Wharton offense is not an indictable offense. In the words of the Court:

> We come thus to the main question in the case,

whether, admitting that the woman, by consenting, has not violated the Mann Act, she may be convicted of a conspiracy with the man to violate it. *** Hence we must decide whether her concurrence, which was not criminal before the Mann Act, nor punished by it, may, without more, support a conviction under the conspiracy section, enacted many years before.

***

In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this ***acquiescence***, though an incident of a type of transportation specifically dealt with by the statute, was ***not made a crime*** under the Mann Act itself. *** **If** this were the only case covered by the Act, **it would be within those decisions which hold**, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit **the offense is not an indictable conspiracy** either at common law, *Shannon and Nugent v. Commonwealth, 14 Pa. St. 226*; *Miles v. State, 58 Ala. 390*; cf. *State v. Law, 189 Iowa 910*; *179 N. W. 145*; see *State ex rel. Durner v. Huegin, 110 Wis. 189, 243*; *85 N. W. 1046*, or **under the federal**

> **statute**. See *United States v. Katz, 271 U.S. 354, 355*; *Norris v. United States, 34 F.2d 839, 841*, reversed on other grounds, *281 U.S. 619*; *United States v. Dietrich, 126 Fed. 664, 667*.

(Bold added) Hence, this Court's opinion in *Gebardi* asserts what this Court's dictum in *Iannelli* denies – that a conspiracy in a Wharton offense cannot be charged separately. And that is so because Wharton crimes do not pose a particular danger to society when it is merely in the preparatory stages. The reason for that is that it is a conspiracy between the *essential* members of the Wharton offense. Congress knows that and has not expressed any desire to punish a Wharton offense beyond the punishment for the substantive offense when only the *essential* members participate. However, as stated, this reasoning and holding in this Court's previous opinions does not seem to be clear to the lower courts. This is particularly so in light of the overreaching opinion in *Iannelli*.

III. Split of opinions. Confusion among lower federal courts and state courts.

As stated, for more than a century the federal, and state courts, have expressed their understanding as to how the Wharton Rule is to be applied in divergent ways. *Iannelli* did not solve that problem since in such case it was found that the Rule did not apply. The Court should settle the differences between the federal courts as to how to apply the Rule in a situation not covered by *Iannelli* like the one before the Court in the present case.

There are two groups of opinions in this controversy, (1) those that think that the conspiracy offense merges in the completed Wharton offense, and (2) those that think that the conspiracy offense does not exists at all. Among those that advocate the first position is this Court's own dictum in *Iannelli*. The First Circuit, in a decision partly relying in *Iannelli's* dictum, also thinks so. In *United States v. Font*, Appeal No. 09-2638 (1st Cir. 2010), this case before the Court of Appeals, the First Circuit affirmed the district court's decision after finding the Petitioner's Wharton argument without merits because it relied in its *United States v. Previte*, 648 F. 2d 73 (1st Cir. 1981) opinion which in turn relied on this Court's *Iannelli* dictum. In the words of the First Circuit in the appeal below:

> [T]he rule does not forbid charging both a conspiracy and a substantive crime – it merely forbids sentencing on both – which did not happen here because defendant was only convicted of the conspiracy count. See *United States v. Previte*, 648 F.2d 73, 77 (1st Cir. 1981).

This shows how entrenched this Court's dictum is among the lower courts. It is accepted by the First Circuit, and many other courts, without any type of reasoning.[1]

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[1]The error already existed before *Iannelli*, e.g. *United States v. Cogan*, 266 F. Supp. 374 (S.D.N.Y. 1967) ("The policy behind this rule is to avoid double punishment.")

A second group of opinions hold that the conspiracy offense *does not exist* at all and should not be charged. The most prominent of these opinions is the one of this Court in *Gebardi*, *supra*. Another opinion, less prominent but more eloquent, is that of the Court of Military Review in the case of *United States v. McClelland*, 49 C.M.R. 557 (1974). In such opinion, the court finds that "the interpretation and application of this Rule ... is one of the most confused, misused, and abused rules of criminal procedure. See generally 91 ALR2d 1156." In order to clarify the correct application of the Rule, the *McClelland* court embarks in a detailed opinion as to why there cannot be an indictable conspiracy offense in Wharton offenses. It correctly criticizes federal courts' opinions which claim that a "conspiracy will not lie if the substantive offense has been committed, but if the actors did not commit the offense, conspiracy would lie."[2] On the other hand, it cites with approval *United States v. Dietrich*, 126 F. 664 (Neb. 1904), which holds the contrary. According to the *McClelland* court, "the *Dietrich* holding was that there was *no* conspiracy, not that it merged with the completed offense." (Italics in the original) The *McClelland* court poses the problem that creates the divergence among the courts as follows:

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[2]The following are among the federal courts criticized in *McClelland* and that hold such position which is in line with those that believe in the merger doctrine as stated above: *United States v. Boisvert*, 187 F. Supp. 781 (R.I. 1960); *Reno v. United States*, 317 F.2d 499 (5th Cir 1963); and *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa 1972).

Courts confuse the basic issue when they attempt to rationalize the reason for the Wharton Rule by saying that the conspiracy merges with the completed substantive offense. Their reasoning is that, if the substantive offense is not completed, the conspiracy does not merge – it remains standing and may be punished. This ignores the basic Wharton Rule that there never was a conspiracy to begin with if it took two people to commit the offense. Other courts approach the rule with the idea that it is a form of double jeopardy to punish for both offenses. See generally 11 ALR 196. Some courts view the problem as one in which the agreement to commit the act and the commission of the act are inseparable and the court would punish as a single act. *Freeman v. United States*, 146 F2d 978 (6th Cir 1945). Another theory is that it is a problem of interpretation of the statute creating the substantive offense, for the statute represents the legislative intent to punish only for the substantive offense which necessarily includes an agreement between the parties. *United States v Sager*, 49 F2d 725 (2d Cir 1931). Another court believes that "the policy behind the rule is to avoid double punishment . . . when the substantive offense itself contemplates an illegal agreement, the parties thereto should not be punished a second time for entering into the same agreement called a conspiracy." *United States v Cogan*, 266 F Supp 374 (SD NY 1967).

Notwithstanding these divergent opinions, *McClelland* correctly states the fundamental matter to be considered – legislative intent. According to *McClelland* at 561-62, something with which this Court agreed in *Iannelli*:

> We submit that Wharton had a valid reason for stating such a rule, although he may not have articulated his theory so as to be readily ascertainable. Conspiracies are made punishable because of the increased danger involved in group offenses. *Woods v. United States*, 240 F2d 37 (DC Cir 1957). The unlawful combination is socially harmful because of the added danger and is punished for that reason. Perkins on Crim Law, Consp 535. The action of two or more persons combining to achieve any unlawful objective may in itself be an evil or social danger independent of the objective. *United States v. Rabinowich*, 238 US 78, 88 (1915): "It is the existence of the conspiracy which creates the danger." *Dennis v United States*, 341 US 494 (1951). It is the *"inclusion of more persons than are necessary* for the . . . [completion of the intended offense which] *brings* the element of *added danger* which is the very reason why any other conspiracy is punished." *Thomas v United States*, 156 Fed 897 (8th Cir 1907). (Emphasis added.) However, some unlawful combinations do not have any element of added danger. **If the substantive offense requires concerted action of two persons**

> **and none participate other than the necessary parties, there is no added danger because nothing additional is involved which is not required to be present in the substantive offense denounced by the statute.** In such a case, there is no logical basis for conviction of other than the substantive offense, if the plan is carried that far, and if not – an attempt to commit the offense, if the plan goes that far. *State v Law, 189 Iowa 910, 911, 179 NW 145 (1920)*; Perkins on Crim Law, Consp 535; 1 Wharton's Crim Law and Proc, Consp § 89.

(Bold added, italics in the original) Hence, since there is no added danger, the fact that the Congress has not expressed any desire to have a conspiracy charged separately, the same should not be charged.

If there were any doubt as to this, the case that started it all, *Shannon and Nugent v. The Commonwealth*, 14 Pa. 226, 227-28 (1850), should be taken into consideration. According to such case:

> [W]here concert is a constituent part of the act to be done, as it is in fornication and adultery, a **party *acquitted* of the major *cannot be indicted* of the minor**. If it were an integral offence, and not an integral part of one, he might otherwise be convicted of it, though he had been before convicted of the whole. We understand that **this plaintiff in error had been *acquitted* of actual adultery**; and

> though the fact is not found in the record, it shows how readily an indictment for the substance of the same thing in another form might be made a means of oppression.
>
> When an adulterous enterprise has been relinquished ... it is **impossible** to believe that society has been so scathed by it, as to admit of no propitiation for it but public castigation.

(All emphasis added) Hence, from the very beginning it was understood that there was no additional danger in a conspiracy to commit a Wharton offense and, thus, it could not be indicted separately unless the legislature expressed the contrary. Those courts that express the contrary, including this one in its *Iannelli* dictum, are contrary to the logic of the Rule and must sustain their logic in some other source. These courts' opinions do not stand alone but are supported by countless other opinions of various courts which stand in direct contradiction to this Court's dictum in *Iannelli* and to the opinions of those courts that agree with the merger reasoning.[3]

Finally, and to further substantiate the split and

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[3]See *Chadwick v. United States*, 141 F. 225, 237 (6th Cir. 1905); *United States v. Burke*, 221 F. 1014 (S.D.N.Y. 1915); *United States v. Hagan*, 27 F. Supp. 814 (W.D. Ky. 1939); *United States v. Shevlin*, 212 F. 343 (D. Mass. 1913); *People v. Keyes*, 284 P. 1096 (Cal. 1930); *Miles v. State*, 58 Ala. 390 (1877); *Washington v. Langworthy*, 594 P. 2d 908 (1979); and *Iowa v. Law*, 179 N.W. 145 (Iowa 1920).

the error in the *Iannelli* dictum, though indirectly, the case law supporting the proposition that there cannot be a conspiracy charge for a defendant found by a jury to have been a participant in merely a buyer-seller relationship, is also supportive of the proposition that a Wharton offense, such as bribery, should also be exempted from been an indictable conspiracy offense. The cases supporting the exclusion of indictments for conspiracy charges in buyer-seller relationships are too numerous to discuss.[4] However, it is clear that the position held in those opinions is contrary to the proposition in this Court's *Iannelli* dictum and of those that rely or support it.[5]

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[4]See, for example: *United States v. Katz*, 271 U.S. 354, 355-56, 46 S. Ct. 513, 513-14,70 L. Ed. 986 (1926); *Norris v. United States*, 34 F. 2d 839 (3rd Cir. 1929); *United States v. Sweeney*, 611 F.3d 459 (8th Cir. 2010); *United States v. Wexler*, 522 F.3d 194, 209 (2nd Cir. 2008); *United States v. Hawkins*, 547 F.3d 66 (2nd Cir. 2008); *United States v. Parker*, 554 F.3d 230 (2nd Cir. 2009); *United States v. Gearhart*, 576 F.3d 459, 465 (7th Cir. 2009); *United States v. Fouse*, 578 F.3d 643 (7th Cir. 2009); *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010); *United States v. Donnell*, 596 F.3d 913 (8th Cir. 2010); *United States v. Wainwright*, 334 Fed. Appx. 762 (7th Cir. 2009); *United States v. Flores*, 341 Fed. Appx. 50 (5th Cir. 2009); *United States v. Thomas*, 365 Fed. Appx. 22, 27 (7th Cir. 2010); *United States v. Gardner*, 369 Fed. Appx. 190 (2nd Cir. 2010); *United States v. Russell*, 378 Fed. Appx. 884 (11th Cir. 2010); *United States v. Plaza-Andrades*, 395 Fed. Appx. 728 (2nd Cir. 2010); *United States v. Childress*, 746 F. Supp. 1122(D.C.D.C. 1990); *State v. Freed*, 599 N.W.2d 858 (N.D. 1999); *Carter v. Commonwealth*, 1995 Va. App. LEXIS 721; and *United States v. Vallar*, 2011 U.S. App. LEXIS 2839 (7th Cir. 2010).

[5]A buyer-seller relationship, like bribery between the bribe taker and bribe giver, is a two person crime. If such crimes cannot be

In light of this obvious split of opinions all around the place, this Court's guidance is needed. The *Iannelli* dictum should be clarified after briefing by the parties on such issue for the courts to have a certain and valid guideline to follow.

IV. Issue of national importance. This Court's dictum in *Iannelli*, which incorrectly claims to have clarified this important area of conspiracy law, affects hundreds of cases each year, not only with regards to bribery offenses, but also other situations such as buyer-seller relationships. The federal courts should have a clear guideline to follow.

Wharton's Rule issues are issues constantly confronted by the federal courts. *Iannelli* did not fully settle the matter. Much needs to be clarified. Bribery cases, as well as buyer-seller relationship cases, abound. Of particular importance are bribery cases involving federal funds where the integrity of the funds provided by tax payers come into question. It is not fair to have citizens that live in particular areas to be exempted from guilt when they have merely "agreed" to commit such crime, without more, while in other areas, such as in the First Circuit, to have these same citizens be thrown into jail for *a crime they did not commit*. Further, even if the opinions that claim

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charged for conspiracy to commit them, neither can bribery crimes like the one for which the Petitioner was found guilty in the present case.

that the merger doctrine is applicable in Wharton cases are valid, the courts should have such doctrine considered and ratified by this Court after been properly briefed on the merits of the issue and not to have courts around the country guessing that such opinion should be the law of the land.

Iannelli is a landmark decision but one that left many questions unanswered in light of the depth of the Wharton Rule. It overextended itself to try to provide a remedy which it was not asked to provide and for which it was not properly briefed. The Court should grant the certiorari to fully consider the specific issue set forth above. In doing so it will settle the issue once and for all and avoid the divergence of opinions concerning the matter throughout the United States federal courts. The certiorari should be granted.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the Court of Appeals' judgment.

Respectfully submitted,

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App. 1

United States Court of Appeals
For the First Circuit

No. 09-2638

UNITED STATES,
Appellee,

v.

JEFF FONT RUIZ,
Defendant, Appellant.

Before
Torruella, Lipez and Howard,
Circuit Judges.

JUDGMENT

Entered: October 8, 2010

Defendant appeals his conviction and sentence, raising eight issues. Having considered the parties' briefs in light of the record, we affirm. We comment briefly on defendant's arguments, which we have classed in three groups.

First, we reject defendant's challenges to the indictment. The district court properly denied as untimely the Fed. R. Crim. P. 29 motion raising the

Wharton's Rule argument, and, even if we reviewed that argument on the merits, it would fail. Defendant has not shown that Wharton's Rule applies here, and, even if it did, the rule does not forbid charging both a conspiracy and a substantive crime--it merely forbids sentencing on both--which did not happen here because defendant was only convicted of the conspiracy count. See United States v. Previte, 648 F.2d 73, 77 (1st Cir. 1981). Defendant next argues that the conspiracy count was confusing and duplicitous. Even assuming these arguments were not waived, they are meritless. Fed. R. Crim. P. 7(c)(1) authorizes a single count to allege that an offense was committed "by one or more specified means," and the trial record contained adequate proof on the charged theory that defendant gave the Section 8 director financial benefits in exchange for unlawfully expediting and approving his tenants' Section 8 vouchers. See United States v. Capozzi, 486 F.3d 711, 717 (1st Cir. 2007) (holding that multi-object conspiracy charge is permissible and that "guilt can be established by adequate proof of any one of the [] charged grounds").

Second, with respect to defendant's claim of ineffective assistance of counsel, the district court properly rejected the claim as untimely under Fed. R. Crim. P. 33. See United States v. Osorio-Peña, 247 F.3d 14, 19 (1st Cir. 2001) (holding that ineffective assistance claims are not considered "newly discovered evidence" within meaning of rule). And, while defendants asks us to consider his ineffective assistance claim, defendant's fact-specific claim is not properly raised in this direct appeal. Id. Accordingly,

we deny the ineffective assistance claim as premature, without prejudice to defendant raising the issue in a 28 U.S.C. § 2255 proceeding.

Finally, we reject defendant's challenges to his sentence. The district court properly denied defendant's request for an evidentiary hearing, see United States v. Gaviria , 116 F.3d 1498, 1527 (D.C. Cir. 1997) (noting that function of sentencing hearing is not to re-try issues which have been explored and decided at trial), and the upward enhancements to defendant's sentence were properly applied and supported by the trial evidence, see United States v. Gobbi, 471 F.3d 302, 314 (1st Cir. 2006) (noting that district court applies preponderance of the evidence standard); United States v. Smith, 101 F.3d 202, 216 (1st Cir. 1996) (upholding sentencing findings supported by trial record).

The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:
/s/ Margaret Carter, Clerk.

cc:
Luke V. Cass
Jose A. Contreras
Jenifer Yois Hernandez-Vega
Ernesto G. Lopez-Soltero
Nelson J. Perez-Sosa
Alexander Zeno

STATUTORY PROVISIONS

18 U.S.C. §371

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 666 (a) and (b)

§666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –
(i) is valued at $ 5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $ 5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $ 5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.